APPEAL NO. 92157

On March 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that (claimant), the appellant, did not sustain a compensable injury in the course and scope of her employment as a licensed vocational nurse with (employer).

The appellant sent an appeal of the hearing decision on April 22, 1992, by telephonic document transfer to the Appeals Clerk of the Texas Workers' Compensation Commission (Commission). The appeal only generally asks for review of the hearing decision, stating "claimant request (sic) that the workers' compensation benefits be granted because her injuries were directly related to the incident which arose out of and in the course and scope of her employment." The respondent replies that the appeal was not timely filed, that it is so general that it violates the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-6.41(a) & (b) (Vernon Supp. 1992) (1989 Act), and that the decision of the hearing officer should be upheld.

DECISION

We affirm the decision of the hearing officer.

(claimant), appellant, was a licensed vocational nurse for the employer on January 30, 1991, when blood splashed into her eye as she removed a catheter from a heart patient. She stated that she had been told the patient had shingles, although there is no medical evidence in the record concerning the patient's condition. Appellant stated that shingles was related to herpes. She then reported to the emergency room, where she was treated, given a tetanus shot, and told by the doctor that she was at no risk. Appellant stated that around the third week of February, she began to feel tired but attributed this to the pace of work. She gave two weeks notice and left the employer on March 9th. She stated that after this date, she began to have blurred vision. Appellant attended a family member's wedding in a suburb of (city), Mexico, the weekend of March 23rd. She stated that all food and water she drank was brought from Texas, with the exception of a Coke she drank at the reception.

By March 28, appellant began "spiking" a fever, and consulted (Dr. S). Dr. S told her she had a virus, perhaps typhus, and referred her to a specialist in infectious diseases, (Dr. J). Between April 1 and 4, 1992, appellant was hospitalized for further tests. Dr J's April 4th discharge notes state, in pertinent part: "hepatitis questionably due to toxoplasmosis, rule out viral etiology . . . fever of unknown origin, likely due to the hepatitis." An April 5th report, however, states that appellant was found to have positive indicators for Hepatitis A (non-infectious), Epstein Barr virus, rubella (consistent with immune status), cytomegalovirus (CMV), herpes type I, and herpes type II. Some of these indicators were, according to the report, consistent with either past or present infection. On February 10, 1992, Dr. J wrote that the diagnosis ultimately was "fever with mild hepatitis--unknown etiology, since resolved." However, he pointedly states: "She was splashed with blood in

January 1991. I do not believe there is any link between this blood exposure and her illness in April 1991."

Four days before the contested case hearing, appellant obtained a statement from Dr. S on one of his prescription slips. Dr. S says, "There is a possibility that the patient's viral infection could have been related to the eye splash of blood. A second opinion with another infectious disease doctor may be helpful." (This was admitted over the objection of respondent, who argued that the document had not been provided to him as required by Art. 8308-6.33(d)). Since leaving the employer, the appellant has worked for other health care providers, but was off from work at the time of the contested case hearing. She stated that the virus is considered a "pre-existing condition" for purposes of health insurance.

I.

As to the contention that the appeal was not timely filed, we note that the 1989 Act, Article 8308-6.41(a) provides in part as follows:

"A party that desires to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings and shall on the same date serve a copy of the request on the other party . . . ."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (TWCC Rules) provides that a request for review of the hearing officer's decision shall be filed with the Commission's central office in Austin "not later than the 15th day after receipt of the hearing officer's decision; . . ." Rule 143.3(c) goes on to provide the following:

"(c)A request made under this section shall be presumed to be timely filed or timely served if it is:

(1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2)received by the commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision."

Finally, Rule 102.5, regarding mailing of communications from the Commission, subsection (h), states:

For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

The hearing officer signed his Decision and Order on March 23, 1992. By letter dated April 3, 1992, the Commission's Division of Hearings & Review forwarded to the parties a copy of the decision and a fact sheet explaining what to do if an appeal is desired. Appellant's request for review does not state the date she received the Commission's transmittal letter. Therefore, applying Rule 102.5, the deemed date of receipt is April 8, 1992. Fifteen days from April 8th yields a due date for filing an appeal of April 23, 1992. The request for appeal was timely filed.

II.

As to whether the grounds for appeal are sufficient, we note that Art. 8308-6.41(b) states that a request for appeal shall clearly and concisely rebut the hearing officer's decision on each issue on which review is sought. In this appeal, appellant seeks a review of the entire decision, and counters that her injuries were directly related to an incident occurring in the course and scope of employment. As that was the single issue under consideration by the hearing officer, we believe that the appeal, albeit sparely stated, is sufficient to seek a review based upon the sufficiency of the evidence to support the decision of the hearing officer.

III.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). As such, he has considerable latitude and sole discretion to find facts from the evidence. His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.- Amarillo 1974, no writ). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred within the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). There must be proven a link between employment and an ultimate disability or disease, and the mere possibility that such a causal connection exists is not sufficient. Scott v. Liberty Mutual Insurance Co., 204 S.W.2d 16 (Tex. Civ. App.- Austin 1947, writ ref'd n.r.e.). Expert testimony may be required where a claimant alleges that employment caused a disease and the fact finder lacks ability, from common knowledge, to find a causal connection. Parker v. Employers' Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Expert medical testimony raises the issue of a causal link if the substance of the testimony establishes a "reasonable probability" of a causal connection between employment and a subsequent disease. Schaefer v. Texas Employers' Insurance Ass'n, 612 S.W.2d 199, 202 (Tex. 1980) [doctor's testimony that infection could possibly have come from contact with soil was a mere possibility held not to rise to level of "reasonable probability"]. *See also* Texas Workers' Compensation Commission Appeal No. 92085 (Docket No. WF-92095439-01-CC-WF71) decided April 16, 1992.

In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.- Beaumont 1991, n.w.h.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.- San Antonio 1983, writ ref'd n.r.e.).

There is sufficient probative evidence to support the hearing officer's decision that the appellant did not prove the link between the splash of blood and her subsequent virus. There is medical evidence indicating that there is no link at all between the events, and Dr. S's statement amounts to no more than speculation about a possibility, rather than "reasonable probability." Further, even if the patient from whom appellant withdrew the catheter indeed had shingles, there was no evidence establishing the connection between such condition and the various diseases for which the appellant tested positive. While the appellant's illness is unfortunate, there is probative evidence from which the hearing officer could conclude that such illness was not incurred in the course and scope of employment.

The hearing officer's decision that the respondent is not liable for benefits is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge